

**BOARD OF FIRE AND POLICE COMMISSIONERS
OF THE CITY OF MILWAUKEE**

In the matter of the appeal of

BOARD DECISION

POLICE OFFICER MICHAEL A. PENDERGAST
from MPD Personnel Order Nos. 2007-105 and 2007-106

Having the opportunity to review the proposed Findings of Fact, Conclusions of Law and Decision and Recommendation as prepared by Hearing Examiner John Carter, responses from the City Attorney and Appellant's Attorney, transcript, exhibits and DVD, resulting from a hearing conducted regarding this matter, we reach the following decision:

We adopt the Findings of Fact and Conclusions of Law numbered 1 through 6 of Hearing Examiner John Carter's recommendation as attached hereto, not inconsistent with this Decision and incorporate them as part of this Decision.

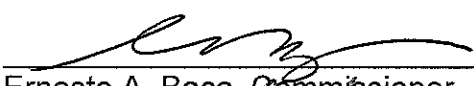
As to Conclusions of Law numbered 7, we find that the proposed discipline reasonably relates to the seriousness of the alleged violation and to Police Officer Pendergast's record of service with the Milwaukee Police Department.

We honor the Chief's decision to suspend Police Officer Pendergast, although it was within her discretion to have discharged Police Officer Pendergast for his non-appearance on the subpoenas due to the seriousness of the offenses for which he was subpoenaed, the inconvenience and cost to the City, and the fact that he took no action to mitigate his absences.


It is the decision of this Board to uphold the 13 day suspension imposed by the Chief as to Personnel Order Nos. 2007-105 and 2007-106 alleging violations of MPD Rule 4, Section 2/010.00 (failure to honor a duly served subpoena).

It is recommended that Police Officer Pendergast continue to seek the necessary professional assistance to maintain the high level of dedication and delivery of services expected of Milwaukee Police Department officers.

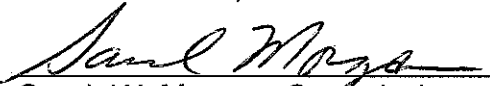
**Board of Fire and Police Commissioners
of the City of Milwaukee**


Ernesto A. Baca, Commissioner

10/05/09


Richard C. Cox, Commissioner

10/06/09


Sarah W. Morgan, Commissioner

10/06/09

BOARD OF FIRE AND POLICE COMMISSIONERS
OF THE CITY OF MILWAUKEE

In the matter of the appeal of

OFFICER MICHAEL A. PENDERGAST

MPD Personnel Order No. 2007-105
2007-106

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION

Hearing Date: June 3, 2009

Conducted Before: John J. Carter acting as FPC Hearing Examiner

Appearances: Michael A. Pendergast in person and by Attorney
Scott J. Jess; The Chief of Police, Edward Flynn, appears
by Heidi E. Galvan, Assistant City Attorney, Milwaukee
City Attorney's Office

Allegation: Order 2007-105.
Violation of MPD Rule 4, Section 2/010.00
(failure to honor a duly served subpoena on
May 5, 2006)

Order 2007-106.
Violation of MPD Rule 4, Section 2/010.00
(failure to honor a duly served subpoena on
May 15, 2006)

SUMMARY OF PROCEEDINGS

At the June 3, 2009 hearing, testimony was received from Inspector Mary Hoerig and Officer Michael Pendergast. A transcript of the proceedings is attached and made a part of the record. As a result, a complete summary of the testimony from each witness will not be provided here.

FINDINGS OF FACT

1. Officer Michael Pendergast, at all times material hereto, was a member of the Milwaukee Police Department and bound by the rules and procedures thereof.
2. Between April 26, 2006 and May 4, 2006, Officer Pendergast failed to appear in Court as required by subpoenas that were duly served upon him a total of five times.
3. On May 5, 2006, Officer Pendergast failed to appear in Court as required by a subpoena that was duly served upon him.
4. On May 15, 2006, Officer Pendergast failed to appear in Court as required by a subpoena that was duly served upon him.
5. On June 29, 2006, the Department interviewed Officer Pendergast regarding his missed court appearances. Officer Pendergast admitted that he failed to appear at all seven appearances for personal reasons that he did not wish to disclose.
6. On April 15, 2007, Officer Pendergast submitted a "matter of" report to the Chief of Police in which he admitted his conduct in missing the seven court appearances; he also described in detail the effect that an October 31, 2003 on-duty critical incident (the officer was forced to take the life of an individual) had on his life and his performance as a police officer.
7. Officer Pendergast's report described the nightmares, sleep loss, physical illness and depression that he suffered from over the months and years that followed the critical incident.
8. Officer Pendergast's mental health issues affected his work and was a substantial factor in causing him to fail to appear at the seven court appearances between April 26, 2006 and May 15, 2006.

9. Subsequent to his missed court appearances, Officer Pendergast has sought psychological counseling and treatment to help him deal with the on-duty critical incident.
10. On May 9, 2007, Officer Pendergast received personnel orders 2007-100 through 2007-106, one for each of the seven missed court appearances. The orders imposed progressive punishment of one day unpaid suspension for the first offense, two days' unpaid suspension for the second offense and so on up to seven days' unpaid suspension for the seventh offense.
11. Personnel orders 2007-100 through 2007-104, and their cumulative 15 days' punishment, are currently the subject of grievance arbitration and not before this Commission.
12. At the time of these events, where the officer missed the court appearances, a progressive discipline matrix was being implemented by the administration of the police department from an oral to a written standard,

APPLICABLE LEGAL STANDARDS

In order to prevail, the Chief of Police must establish by a preponderance of the evidence that the accused Department member acted in violation of Milwaukee Police Department rules and/or procedures.

The Board of Fire and Police Commissioners, in order to sustain the Chief of Police's decision, must find that the member violated Department rules and/or standard operating procedures as alleged in the complaint and that a preponderance of the evidence supports a finding of just cause as defined in section 62.50(17)(b), Wis. Stats.

CONCLUSIONS OF LAW

As to Orders 2007-105 and 2007-106, alleging that Officer Pendergast failed to appear in Court pursuant to duly served subpoenas in violation of MPD Rule 4, section 2/010.00:

1. The parties stipulate that Officer Pendergast reasonably had knowledge that his conduct violated the rules of the department and would likely result in disciplinary action.
2. The parties stipulate that Rule 4, section 2/010.00 is reasonable.
3. The parties stipulate that prior to issuing these charges against Officer Pendergast, the former Chief of Police, Nannette Hegerty, or those acting on her behalf, made a reasonable, fair and objective effort to determine whether or not Officer Pendergast did in fact engage in the conduct alleged.
4. The parties stipulate that the investigation by the Chief of Police, or those acting on her behalf, was fair and objective.
5. The parties stipulate that Officer Pendergast failed to appear in Court on both occasions as required by subpoenas that had been duly served upon him.
6. The discipline applied by the Chief of Police was fair and non-discriminatory to Officer Pendergast.
7. The hearing examiner concludes that the discipline is not reasonable as it relates to the seriousness of the violations and the officers service record with the Department. The hearing examiner concludes that although these two violations must be viewed independently, they are part of a collective demonstration of this officer's reaction to the critical incident occurring

years earlier. To the officer's credit, he has subsequently received appropriate intervention by professionals; to his detriment, he did not receive sufficient care prior to these incidents. The 15 day cumulative discipline suspension without pay is, in this examiner's judgment, a reasonable penalty for the totality of the events.

DECISION AND RECOMMENDATION

The hearing examiner determines that the penalties not be sustained, and recommends that no penalty be assessed or, in the alternative, that a penalty of 6 and 7 days suspension respectively be determined and they be permanently stayed in light of the 15 day suspension of the other violations which are not before the Commission.

It is further recommended that the officer continue to seek the necessary professional assistance to maintain the high level of dedication and delivery of services that he has demonstrated in the past.

Board of Fire and Police Commissioners
of the City of Milwaukee

By:

Commissioner

Date

Commissioner

Date

Commissioner

Date